IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~230~~ 5

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL,

Petitioner,

*against*

NATIONAL LABOR RELATIONS BOARD,

Respondent.

## REPLY BRIEF FOR PETITIONER

HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.

ABNER H. SILVERMAN,
EMANUEL BUTTER,
ALEXANDER C. RUSSOTTO,
401 Broadway,
New York 13, N. Y.,

Counsel for Petitioner.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952

No. 230

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL,

Petitioner,

*against*

NATIONAL LABOR RELATIONS BOARD,

Respondent.

## REPLY BRIEF FOR PETITIONER

### I

The Board's position on the paramount substantive question herein involved is summarized at pages 43-44 of its brief, as follows:

> And while the amended Act permits a union to adopt and pursue any membership policy it deems wise, to exert any internal union discipline it desires, and to deny or terminate membership on any ground it chooses, the essence of the statutory scheme is that the union is forbidden to exercise control over employment for the purpose of enforcing any aspect of its membership policy other than to compel dues payment through a union security agreement. *Id.*, pp. 22-25.

> The proviso to Section 8 (b) (1) (A) safeguards the union's right to promulgate its membership policy; but the remainder of the statutory scheme safeguards the employee from compulsory adherence to it through control over his employment. *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, 1012 (C. A. 7), certiorari denied, 342 U. S. 815. In short, except for dues payment through a valid union security agreement, union membership and the right to a job are divorced.

When read in conjunction with its brief in *Teamsters,* this means that no control or interference may be exercised even when a man has *agreed* to such control either by contract vis-a-vis his Union or by contract vis-a-vis his employer. The Board recognizes no distinction between the case of a man who wishes to abstain from joining a union and one who voluntarily elects to join. Furthermore, the Board's concept would seem to mean that when union policy conflicts with the desire of an individual member to refrain from participating therein, union policy must be subordinated. If the Board be upheld in this view, it will, while professing to aim only at "discrimination", be striking a mortal blow at every form of order, system, or discipline which may be adopted by a union for the governance of its members; and the rights which the Board vouchsafes to a union "to adopt and pursue any membership policy * * * to exert any internal union discipline it desires * * * to deny or terminate membership * * *" (*Id.,* pp. 1-2) become empty and meaningless phrases.

We urge that where a union has lawfully adopted a policy—where for example it has agreed with its members and an employer as to the method by which it shall implement the formalization of a hiring (in this case, by issuing a clearance)—it has the right to lay down reasonable and equitable rules for the orderly handling of such procedures.

It has this right no less than an employer has the right to require that all applicants for employment shall make their applications through the personnel office rather than to the president of the company. It has the right, no less than an employer, to say that jobs shall be filled on a first-come first-served basis—so long as this policy is carried out with no intent to favor a union man over a non-union man.

The Board, on the other hand, insists that if a union attempts to enforce such policies and rules, it is guilty of "discrimination", and that such "discrimination" inherently "encourages membership."

We urge that Congress intended no such destruction of the machinery of collective bargaining. The principles of mutual restraint and forbearance permeate the "declara tions of policy" contained in the Act; and when the Act is read as a whole, it is apparent that Congress evinced no intent to destroy the right of a man voluntarily to undertake and accept the advantages and obligations of Union membership.

It is because of the Board's misconception on this score that the Board persists in the position (Board's brief, p. 35) that Fowler was *refusing* "to cooperate with the Union in its (hiring hall) program" and that this constituted "an exercise of the right to refrain". Not a word is said in answer to our contention that Fowler's conduct evinced an intent to *"engage"*, albeit upon his own terms, rather than to *"refrain"*.

The scheme of the act obvously is that membership in a Union shall be made available to employees desirous of joining or retaining membership "on the same terms and conditions generally applicable to other members" Section 8(a)(3). It was not intended that membership must be made available on such terms and conditions as the individual member may himself choose to enforce or live up to.

> The proviso to Section 8 (b) (1) (A) safeguards the union's right to promulgate its membership policy; but the remainder of the statutory scheme safeguards the employee from compulsory adherence to it through control over his employment. *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, 1012 (C. A. 7), certiorari denied, 342 U. S. 815. In short, except for dues payment through a valid union security agreement, union membership and the right to a job are divorced.

When read in conjunction with its brief in *Teamsters,* this means that no control or interference may be exercised even when a man has *agreed* to such control either by contract vis-a-vis his Union or by contract vis-a-vis his employer. The Board recognizes no distinction between the case of a man who wishes to abstain from joining a union and one who voluntarily elects to join. Furthermore, the Board's concept would seem to mean that when union policy conflicts with the desire of an individual member to refrain from participating therein, union policy must be subordinated. If the Board be upheld in this view, it will, while professing to aim only at "discrimination", be striking a mortal blow at every form of order, system, or discipline which may be adopted by a union for the governance of its members; and the rights which the Board vouchsafes to a union "to adopt and pursue any membership policy * * * to exert any internal union discipline it desires * * * to deny or terminate membership * * *" (*Id.,* pp. 1-2) become empty and meaningless phrases.

We urge that where a union has lawfully adopted a policy—where for example it has agreed with its members and an employer as to the method by which it shall implement the formalization of a hiring (in this case, by issuing a clearance)—it has the right to lay down reasonable and equitable rules for the orderly handling of such procedures.

It has this right no less than an employer has the right to require that all applicants for employment shall make their applications through the personnel office rather than to the president of the company. It has the right, no less than an employer, to say that jobs shall be filled on a first-come first-served basis—so long as this policy is carried out with no intent to favor a union man over a non-union man.

The Board, on the other hand, insists that if a union attempts to enforce such policies and rules, it is guilty of "discrimination", and that such "discrimination" inherently "encourages membership."

We urge that Congress intended no such destruction of the machinery of collective bargaining. The principles of mutual restraint and forbearance permeate the "declarations of policy" contained in the Act; and when the Act is read as a whole, it is apparent that Congress evinced no intent to destroy the right of a man voluntarily to undertake and accept the advantages and obligations of Union membership.

It is because of the Board's misconception on this score that the Board persists in the position (Board's brief, p. 35) that Fowler was *refusing* "to cooperate with the Union in its (hiring hall) program" and that this constituted "an exercise of the right to refrain". Not a word is said in answer to our contention that Fowler's conduct evinced an intent to *"engage"*, albeit upon his own terms, rather than to *"refrain"*.

The scheme of the act obvously is that membership in a Union shall be made available to employees desirous of joining or retaining membership "on the same terms and conditions generally applicable to other members" Section 8(a)(3). It was not intended that membership must be made available on such terms and conditions as the individual member may himself choose to enforce or live up to.

In its attempt to becloud this point the Board refers to the rules governing the issuance of clearance as "unwritten" (Board's brief, p. 39), and elsewhere it implies that the clearance system was some arbitrary device employed by the Union to impose dictatorial control. But there can be no doubt whatever from the record that Fowler well understood the rules relating to the issuance of clearance, that his understanding was in complete conformity with the Union's contentions relating thereto, and that he elected to participate therein. No further demonstration of this fact is required than to remind this Court of the fact that Fowler's "protest" of Miller's assignment to the S. S. Frances was predicated upon the fact, though mistaken, that Fowler believed himself to have been longer unemployed than was Miller.

The Board further asserts (Board's brief, p. 37, Note 15), that there is "little factual support" for the claim that the Union's conduct was motivated by Kozel's right to retain his job. We urge that the record clearly belies this contention, and indeed the Trial Examiner and the Board clearly held that the Union was motivated by this consideration (B. A. 59). This turn about in the position of the Board on this subject is obviously inspired by the Board's recognition of the error of the Court below in holding this factor to be immaterial; and its attempt to bolster the position of the Court below in holding this factor to be immaterial should not go unnoticed.

The Board argues further (Board's brief, p. 39) that the Union's sole means of enforcing its membership rules was to divest Fowler of his status as a member in good standing, whereupon it properly could have denied him *any* employment with any of the companies covered by the contract in accordance with the agreement. But, argues the Board, the Union, while free to expel or suspend Fowler for his conduct, was unable to suspend his good standing to the limited extent of depriving him of a specific

job aboard a specific ship. It is strange logic, indeed, which leads to the conclusion that the part is greater than the whole.

Moreover, the Board argues that a member's default in the performance of his membership obligation is meaningless "if the default is not *translated*[1] by the Union into loss of membership in good standing"—the implication being that the test of "lo of good standing" is dependent upon the degree of formalism by which such loss of good standing is accomplished; and the Board argues further that it matters not how inequitable may be the rule under which a member loses his good standing, provided only that formalism be observed (Board's brief, p. 39). This means that you may "penalize" a member inequitably if you do so with formality; but you may not "penalize" on clearly equitable grounds if you are not scrupulously careful in following formalities.[2] Our notions of basic justice are outraged by such reasoning.

The troublesome implications above indicated are engendered by the Board's loose usage of the word "discrimination". It fails to recognize the need to probe *circumstance* and *motive* to ascertain the existence or non-existence of "discrimination". A man who is sent by an officer to the back of a line of people waiting to buy tickets to a baseball game is not "discriminated" against when the purpose is to maintain order and prevent

---

[1] It seems that this "translation" must comport with the Board's views upon the union procedure by which the "translation" is accomplished (B. A. 49-50, 62).

[2] The Board's view seems to preclude the possibility that a member who clearly violates his union obligations may, upon such violation, instantly cease to be in "good standing", at least for certain purposes.

Query: Is a man in good standing for purposes of attending a union meeting when he is boisterously intoxicated; or must a union go through the formality of suspending him before excluding him from the meeting room?

physical injury—although such a man admittedly is deprived of the right to buy his ticket precisely at the moment he desires. Furthermore, the lack of "discrimination" under these circumstances is not altered even if we add to our assumption the further fact that the officer, honestly misreading his orders, has called for the formation of a single rather than a double line.[3] On the other hand, a man who properly reaches his turn at the head of the line and is singled out to be sent to the back of the line because the officer on duty does not like the cut of his coat is a victim of "discrimination".

## II

a) In seeking to sustain the propriety of its back pay award, the Board cites only its own decisions in Pen & Pencil Workers, 91 NLRB 883, and Quinley, 92 NLRB 877. It urges that its power to order back pay without reinstatement as illustrated in certain employer cases (Board's brief, p. 56, Note 24) establishes a rule which is applicable here. Here again the fallacy of the Board's reasoning becomes apparent upon analysis. Thus it argues that since back pay without reinstatement has been found proper in certain employer cases where necessity and reason left no other choice (see examples cited in Board's brief page 60) that a general, *carte blanche* rule is inferrable therefrom. In each of those cases, however, it is clear that reinstatement *could* and *would* have been ordered save for the circumstances which there existed making such a direction inappropriate. Hence, it may fairly be said that reinstatement *was* constructively ordered in each of those cases. In the instant case, *per contra,* had the employer been joined, no consideration of

---

[3] Certainly there can be no doubt that the Union here had at least *colorable* justification for its interpretation of the contract and the "clearance" provisions thereof.

necessity and reason would preclude reinstatement. On the contrary, it is safe to assert that no order could or would have been made sustaining the charge *without* ordering reinstatement.

The Board argues further that the phrase "where an order directs reinstatement" in the proviso to Section 10 (c) is merely "illustrative language" and it would have this Court treat that phrase as mere "casual description". But the Board does not trouble to apprise the Court of the fact that in the case of *NLRB* v. *J. I. Case,* 198 F. (2d) 919, on which it relies (Brief, p. 58) the reference to "casual description" dealt with the word *"discrimination"* in the proviso to Section 10(c) and not with the phrase here involved. Its contention that the phrase "where an order directs reinstatement" may be treated as "illustrative language" overlooks the fact that this illustrative language was already in the statute. The identical phrase appears in Section 10(c) immediately before the proviso here involved. Hence the repetition of this language in the proviso was wholly unnecessary for illustrative purposes, especially in the light of settled law as to its meaning under the Wagner Act. We do not believe that this Court will agree that Congress purposelessly *repeated* illustrative language in a proviso.[4]

The words may have been "illustrative language" when originally incorporated in the Wagner Act but certainly

---

[4] The fundamental principle that such a proviso must be strictly construed and that one seeking to come within a proviso to a statute must comply strictly *with the words as well as the reason* for the proviso has been enunciated by the courts. See, *e. g., Hartford Electric Light Co.* v. *Federal Power Commission,* 131 F. 2d 953, 962 (C. A. 2), certiorari denied, 319 U. S. 741; *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission,* 105 F. 2d, 667, 674 (C. A. 3), certiorari denied, 308 U. S. 625; *Fleming* v. *Hawkeye Pearl Button Co.,* 113 F. 2d 52, 56 (C. A. 8); *U. S.* v. *Dickson,* 40 U. S. 141, 165; *Canadian Pac. Ry. Co.* v. *U. S.,* 73 F. 2d 831, 834 (C. A. 9); *Rochester Telephone Corporation* v. *U. S.,* 23 F. 2d Supp. 634, 636 (W. D. N. Y.), aff'd 307 U. S. 125; *Spokane & Inland R. R.* v. *U. S.,* 241 U. S. 344, 350.

their repetition in the proviso—wholly unnecessarily unless meaningful—must be considered "an injected limitation." In this connection, note too, that in the case of a mere "attempt", back pay would not be involved.

(b) The Board claims (Board's brief, p. 54) that the question of the propriety of a back pay award without a reinstatement provision under the proviso to Section 10 (c) was not raised before the Board or the Court below. We urge that it was raised before the Board in our exceptions, and in our brief in support of our exceptions (pp. 35, 36, 39, 27 and 32). It was also raised in our brief in the Court below (pp. 39 to 41). Moreover, there can be no doubt that it was raised in our petition for the writ (pp. 19 and 20) and the Board did not then even suggest that the point had not been raised below. (See p. 18, Note 13, NLRB brief in opposition to the petition for the writ.)

## III

On the question presented by its failure to join the employer, the Board argues (Board's brief, p. 53) that since a private plaintiff may select one of several *tort feasors,* the Board has the same prerogative "in the absence of compelling circumstances not here suggested." Here again, the Board overlooks the public nature of its duty to effectuate the purposes of the Act and the "compelling reasons" for proceeding against employer and labor organization alike, which it has itself enunciated in *Newman,* 85 NLRB 725. Further, citing only its own decision in *Quinley,* 92 NLRB 877, the Board argues that the Court may not intrude upon the undisclosed reasons which may prompt the General Counsel to select one and omit another party. We are confident that this Court will not agree that it should abdicate before arbitrary agency action which results in the destruction of Congressional intent. *Norton* v. *Warner Company,* 321 U. S. 565; *Dobson*

v. *Commissioner*, 320 U. S. 489; *Gray* v. *Powell*, 314 U. S. 402; *Shields* v. *Utah Idaho & Central R. R.*, 305 U. S. 177; *A. F. L.* v. *Labor Board*, 308 U. S. 401, 412; *U. S.* v. *Griffin*, 303 U. S. 226, 238 and *Shannahan* v. *U. S.*, 303 U. S. 596, 603.

In further attempting to justify its failure to join the employer, the Board now argues for the first time (Board's brief, p. 51) that since the Board did not issue its complaint until after the six month period had elapsed, no charge could be levelled against the Company; and that since the result of dismissing the complaint would have been to have the discrimination go completely unremedied, it was correct in proceeding against the Union alone.

This is tantamount to arguing not merely that the Union must abide the consequences of the Board's delay in issuing the complaint but further that the charging party should not be required to take the consequences of the form of the charge which he elected to file. The charge, signed by Fowler, clearly specified (B. A. 8) that the Union caused A. H. Bull Steamship Company to discriminate against him in violation of the Act. Hence, Fowler's deliberate refusal to level his charge against the employer was an election on his part, the consequences of which he must take. From the point of view of the enforcement of the public rights involved, we maintain that it were better that the case be dismissed than have it proceed against the Union alone. *Newman*, 85 NLRB 725. The situation would then be no different than that which prevails in countless cases which are not processed at all because of the six month limitation contained in the statute. The failure to proceed at all, under the circumstances here involved, would be an undue hardship only if the case be viewed as a private matter—and as a private matter, Fowler must be held to the consequences of his election.

## IV

Upon the "free speech" question:

The Board refuses to recognize that while instigation may be sufficient to "induce or encourage" that it requires something more than instigation to "restrain or coerce", for as this Court has pointed out, it is the *objective* and not the quality of the means which is controlling in a secondary boycott case—not so, in the case of "restraint or coercion".

Contrary to the holding in *NLRB* v. *Denver Building* 341 U. S. 943 and *NLRB* v. *IBEW,* 181 F. 2d, 39, the Union's protest of Kozel's discharge and its refusal to issue clearance was not a signal "tantamount to a direction to strike", nor was it "bare instigation" as was the "unfair" sign; and this Court may well recall Judge Hand's injunction against restraining speech which falls within even "the ambivalent area". *NLRB* v. *IBEW, supra.*

Respectfully submitted,

HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.

ABNER H. SILVERMAN,
EMANUEL BUTTER,
ALEXANDER C. RUSSOTTO,
401 Broadway,
New York 13, N. Y.,

Counsel for Petitioner.

BLURRED COPY